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THE RAILROAD PASSENGER PROBLEM:
AMERICAN AND BRITISH EXPERIENCES AS
BASES FOR A NEW MODEL*

Railroad empire-builder James J. Hill is said to have compared the passenger train to the male teat, characterizing it as "neither useful nor ornamental."1 Hill's cryptic comment, made at a time when the passenger train was nearly the exclusive means of intercity transportation in the United States,2 represents one position in a continuing debate.3 On one side, railroad industry officials contend that, when their industry was being forced to absorb the costs of providing a poorly patronized passenger service, they were providing a service neither demanded by public necessity nor justified by the responsibilities owed to corporate shareholders and freight shipping customers.4 Examining the

*The author gratefully acknowledges the cordial and competent assistance of Rhoda Berkowitz, Chief Reference Librarian, and Emelyn House, U.S. Government Documents Librarian, at the University of Michigan Law Library, in locating and suggesting many of the sources used in this article.

2 See H. PORTER, Railway Passenger Travel, in THE AMERICAN RAILWAY 228 (1897).
See also J. STOVER, AMERICAN RAILROADS 37-63 (1961).

4 See 1969 Hearings, supra note 3. at 212-56. See also Watt, Rail Passenger Transportation in PASSENGER TRANSPORTATION 325-48 (S. Hollander ed. 1968).
problem from a different perspective, railroad enthusiasts and representatives of consumer lobbies argue that the maintenance of passenger train service is essential to public convenience and forms a necessary part of a balanced national transportation system. Economists, considering the relative value of the service as compared with its cost, draw different conclusions as to what part of the service, if any, should be retained.

This inquiry does not consider the complex and countervailing policies underlying the fundamental issue of whether passenger trains remain a necessary and viable means of transportation. Rather, it assumes that the findings of the Congress, as embodied in the Rail Passenger Service Act of 1970, conclusively establish the public necessity for passenger train service. The relevant area of inquiry is therefore narrowed to a consideration of the proper means of providing this service. This article examines the character of the rail passenger problem, identifies the American and British governments' responses and proposes a hybrid model of a rail passenger service organization based on several intrinsic characteristics of these existing systems. The article implies that the profit standard inadequately measures the success of a public utility, and suggests the adoption of an eclectic standard that measures enterprise success in terms of economic viability, response to public need, and quality of service rendered. The proposed model involves the rediscovery, application, and combination of two organizational concepts: the public corporation and the interstate compact.

I. THE NATURE AND SCOPE OF THE PROBLEM

A. The American Experience

The rail passenger problem is essentially financial. Rail carriers

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5 See, e.g., TRAINS, DEC., 1968 at 3-4, 13. See also 1968 Hearings, supra note 3, at 81-92 (statement of Anthony Haswell, Executive Director, National Association of Railroad Passengers).


The Congress finds that modern, efficient, intercity railroad passenger service is a necessary part of a balanced transportation system; that the public convenience and necessity require the continuance and improvement of such service to provide fast and comfortable transportation between crowded urban areas and in other areas of the country; that rail passenger service can help to end the congestion of our highways and the overcrowding of airways and airports; that the traveler in America should to the maximum extent feasible have freedom to choose the mode of travel most convenient to his needs.

have long maintained that, despite intensive efforts to improve and promote the quality of passenger services, revenues fell so far below costs that continuance of wide-scale passenger service threatened their viability as privately operated common carriers. Although a "passenger deficit" has been a persistent phenomenon and freight service is clearly more profitable than passenger service, no industry-wide passenger deficit was reported by the Interstate Commerce Commission (ICC) until 1930. Since 1946, such deficits have occurred annually. The magnitude of the problem is equally troublesome. In 1970, the last full year of independently operated intercity rail passenger service, the ICC reported a rail passenger deficit of $476.7 million, and in 1971, it reported that the combined passenger deficits of Class I railroads accumulated over the period 1951 through 1970 exceeded $10.7 billion.

Although the size of the passenger deficit has been disputed.

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9 The ICC defines the term "passenger deficit" as, "the amount by which the revenues from railroad passenger-service operations fall short of covering operating expenses. taxes. and net rents assigned or apportioned to this service." Railroad Passenger Train Deficit, 306 ICC 417. 419 (1959).

10 Id.

11 Id. at 419. 486. See also 1971 Senate Hearings. supra note 3. at 591-92. 805; ICC Annual Reports for the Years 1946-1971.


13 A common carrier by rail is currently designated a Class I railroad when its gross annual revenues attain or exceed five million dollars. See 1971 Yearbook of Railroad Facts 3.


15 There has been considerable disagreement about the proper method for most accurately calculating the passenger deficit, but two principal methods are used: those operating under a theory of fully allocable costs and those utilizing avoidable costs. See generally S. Berge, Railroad Passenger Service Costs and Financial Results 20-26 (1956); S. Berge, Railroad Passenger Trends 1950-1960 (1961); D. Ladd, Cost Data for the Management of Railroad Passenger Service (1957); Aeronautical Research Foundation. Avoidable Costs of Passenger Trains Service (1957); National Ass'n of R.R. and Util. Comm'rs. Reports of the Special Comm. on Cooperation With the ICC in the Study of the Railroad Passenger Deficit Problem (1952-1957).

The traditional ICC formula for deficit calculation is a product of the fully allocable costs theory. An essential part of the formula involves the separation of purely passenger service related costs from total railroad operating costs. Approximately three-quarters of the passenger service costs can be identified and separated from freight costs, and these are designated "solely related expenses." The remaining expenses which cannot be readily categorized are allocated between passenger and freight services on the basis of "some
there is general agreement on its precipitating causes and consequent impact. The principal cause of declining passenger revenues has been an American consumer preference for faster and more flexible intercity transportation. Despite a reluctance to abandon the passenger train completely, the consumer in-

appropriate unit of service or work performed." See Separation of Operating Expenses, Freight and Passenger, 302 ICC 735 (1958). The ICC "appropriate unit" language has been used to refer to operating cost units such as gross ton-miles, switching locomotive hours, and locomotive miles. These costing unit factors are then applied to expense accounts which are common to the provision of both passenger and freight service such as maintenance of way and structures. See Railroad Passenger Train Deficit, 306 ICC 417, 420 (1959). This method of cost allocation tends to inflate expense figures reported to the ICC by the railroads as compared with the actual out-of-pocket expenses incurred by the continuance of passenger train service. The deficit this method produces has been termed the "ICC full-deficit" and it has been subjected to a good deal of critical comment. See 26 Cong. Q. Almanac 806 (1970). See also Berge, supra note 6, at 247-58.

Critics of the "full deficit" maintain that while a fully allocable cost accounting system may make sense when used by railroad management to categorize expense data for its internal use, the system has no legitimate function in calculating accurate passenger deficit because it misstates economic realities. These critics argue that expenses charged to passenger train service under the fully allocable cost method, such as costs for the maintenance of way and structures, could not be fully eliminated if there were a curtailment of all such service. See, e.g., Berge, supra note 6, at 247-58. Avoidable costing, it is suggested, would provide a more accurate means of analyzing the scope of the deficit because it is based on expenses that would be saved if no passenger train service were provided. In its simplest form the avoidable cost method produces a solely related expense figure that represents only one component in the ICC full-deficit formula.

Application of the full-deficit formula to railroad cost figures has resulted in a reported passenger deficit for every year since 1946. Using the solely related expense method, passenger service showed a profit as recently as 1962 for Class I railroads as a whole, and, with regard to the Eastern District carriers, this method indicates a profit on the service earned for every year from 1958 to 1966. See notes 10-11 and accompanying text supra. See also 26 Cong. Q. Almanac 807 (1970).

The ICC itself has noted the substantial disparity between the deficit figures produced by the two methods and, in 1969, issued a report which examined eight rail systems for the purpose of determining the amount these railroads could have saved if they had not operated intercity passenger service in 1968. See 82 ICC Ann. Rep. 7 (1968). See also 83 ICC Ann. Rep. 12-13 (1969). The eight carriers studied accounted for more than 40 percent of the nation's noncommuter rail passenger miles in 1968 and reported a combined "full" passenger deficit of $214.3 million in 1968. Net avoidable expenses totaled $118 million (before taxes) for the same period. The study concluded that "the ICC full deficit greatly overstated the savings which the railroad could have made" and that "[a]ll attempts to portray the passenger burden in terms of that data should ... be wholly disregarded .... A more adequate method .... lies in the application of avoidable costing." 83 ICC Ann. Rep. supra at 12. See also 26 Cong. Q. Almanac 806 (1970). By the time the ICC reached this conclusion, however, the passenger deficit had become real and substantial regardless of the accounting method used to compute it. See 1971 Senate Hearings, supra note 3, at 845-47. 859.


The passenger train's sentimental, if not practical, hold on the American consumer's imagination is evidenced by a survey conducted by Louis Harris & Associates for the National Railroad Passenger Corporation. The survey reported that:

[B]y a margin of 64% to 22%, the 3,000 person attitude survey favored continuing intercity passenger service 'even if it means federal subsidies.' By 82% to 10% the public feels it 'must have the option' of such service ... [a]nd by a 63% to 23% count. Americans feel 'there is something exciting about a trip by train.' Wall St. J., Oct. 4, 1972, at 10, col. 4 (midwest ed.). See also Traffic World, Oct. 16, 1972, at 19-20.
creasingly depends on other modes of intercity transportation, leaving railroads insufficient traffic volume to justify existing service levels. As early as the 1920's, the automobile accounted for 79.8 percent of all intercity passenger miles as compared with 15.5 percent for the passenger train.\(^{18}\) The development of air transportation and the construction of the interstate highway system aggravated the revenue drain from railroad passenger operations. By 1969, Class I railroads accounted for only 1.09 percent of all intercity passenger miles while airlines and automobiles accounted for 9.83 and 86.53 percent respectively.\(^{19}\) Compounding the problem of a shrinking market is the necessity of coping with continually increasing costs. In 1967 alone the cost of providing the limited service then offered increased 20 percent over the preceding year.\(^{20}\) In addition, passenger service providers have faced the erosion of peripheral service revenues, most notably the loss of United States mail carriage. Since nearly one-third of all revenues produced by passenger service were derived from mail transportation contracts, the reduced availability of these contracts has significantly contributed to the unprofitability of the passenger train.\(^{21}\) The impact of the passenger deficit has been unquestionable. In 1929, approximately twenty thousand passenger trains were being operated in the United States; in 1970, the comparable figure was three hundred sixty.\(^{22}\) During the period between 1920 and 1970, the United States experienced a continuing contraction of rail passenger service in the face of continually accumulating financial losses. By 1970 the railroad industry's efforts to eliminate what was regarded as an intolerable drain on its earnings had effected the near extinction of the intercity passenger train.

\(^{18}\) 26 Cong. Q. Almanac 806 (1970).
\(^{20}\) 82 ICC Ann. Rep. 5 (1968). One of the principal components of increasing cost is labor expense. A recent study indicated that total labor costs per hour on duty for a passenger train crew averaged 50 percent higher than those for an airline crew and 600 percent higher than those for an intercity motor bus driver. See Railroad Passenger Train Deficit, 306 ICC 417, 436-43 (1959); 1971 Senate Hearings, supra note 3, at 90-91 (statement of Anthony Haswell).

Mail revenues received by Class I railroads for passenger and freight service in 1967 were $263.6 million, a drop of $40.4 million or 13.3 percent below 1966. Express revenues declined 9.8 percent in 1967 to $60.7 million. Decreases in Class I railroad mail and express revenues have been factors in the reduction in intercity rail passenger operations.

Id. at 8.

\(^{22}\) Thoms. Amtrak: Rail Renaissance or Requiem?, 49 Chi-Kent L. Rev. 29, 31 (1972).
B. The International Experience

Although the techniques and theories of railroad operation vary widely among industrialized countries, the financial problem associated with transportation of passengers by rail is nearly universal. The passenger service problem in the United States is not intrinsically different from that of other countries, but the American remedial measures are distinctive. The fundamental organizational difference between domestic and foreign railroads is that the former are operated under a system of private management while the latter are primarily government-owned and operated. Government financing and control is responsible for the continued existence of an extensive grid of passenger train routes throughout England, the Continent, and Japan.

Critics of American railroad passenger service note that the United States has fallen behind other industrialized nations in terms of the quality of service its rail carriers offer. Although the passenger railroad systems of other countries continue to set the standard for both quality and quantity of service, these systems have not been immune from the operating deficits that compelled contraction of American services. Indeed, nearly every nationalized railway system providing significant passenger services sustains substantial annual deficits. Compared to the $476.7 million deficit of American Class I passenger carriers in 1970, the nationalized railway systems of West Germany, Italy, Japan, and Canada sustained operating losses of approximately $390 mil-

23 See Allen. All Railroads Are Living In Glass Houses, TRAINS, Aug.. 1971, at 20.
24 See generally G. Allen, The Structure of Industry in Britain (1961); M. Einaudi, M. Bye, & E. Rossi, Nationalization in France and Italy (1955); B. Lewis, British Planning and Nationalization (1952); Coyne, The Board of Transport Commissioners for Canada, 26 CAN. BAR REV. 950 (1948); Allen, supra note 23. at 20-22; The Case For- And Against-Nationalization, TIME, JULY 20, 1970, at 59.
25 See, e.g., Thoms. supra note 22. at 31. See also 1968 Hearings, supra note 3, at 81-92 (statement of Anthony Haswell).
27 See notes 9–15 and accompanying text supra.
28 The Canadian situation is particularly interesting in that both major Canadian rail carriers. government operated Canadian National and privately operated Canadian Pacific, began an extensive program in the early 1960’s to improve and promote their passenger service. See Passenger Policies of the Canadian Railways, in S. Hollander. supra note 4. at 316–25. Their experiment was intended to determine if intensive promotion by government and private carriers could lure large numbers of people back to rail travel when the service provided was of high caliber and attractive fare options were offered. The deficits accumulated by both carriers as a result of providing such services indicate that the
Clearly the railroad passenger problem is not endemic to the United States. The provision of such services materially contributes to the operating losses sustained by nationalized rail carriers of many countries. The carriers' financial reports indicate that varied operating conditions and different systemic goals do not significantly affect the proposition that transporting people by railroad in the 1970's is generally not profitable. Most industrialized nations have accepted this proposition and have subsidized the cost of rail passenger transportation where the service is found to be necessary.

II. THE CONGRESSIONAL RESPONSE

A. 1958-1969

During the late fifties and throughout the sixties, Congress' response to the railroad passenger problem was sporadic. By 1958 passenger service losses were threatening the financial integrity of the railroad industry as a whole. The Transportation Act of 1958 was passed as a package of reform measures intended to relieve the carriers from some of the more onerous federal regulations.

The most recent figures indicate an increase rather than a leveling off of deficits. West Germany's and Italy's nationalized rail systems each lost approximately $800 million in 1972. and Japanese National Railways projected a loss of $1.2 billion for fiscal year 1973. U.S. NEWS & WORLD REPORT, Feb. 19, 1973, at 83. However, it should be noted that the enormous loss figures cited for Germany, Italy, and Japan are not solely the result of extensive rail passenger operations. They represent operating losses incurred in freight operations as well. To some extent, particularly in Germany and Japan, the railroads are used by their governments for social ends aside from merely providing efficient transportation. For example, dispersing population and relieving highway congestion. The large losses these carriers sustain in furthering these policies might be regarded as costs the government is willing to assume to effect a comprehensive social development plan. The Italian railroad deficit is somewhat unique in that it seems to be the product of exempting nearly all of the railroad's customers, whether passengers or shippers, from some portion of the published relevant tariffs. See Allen, supra note 23, at 20-22.

See generally G. Hilton, supra note 3; Thorns, supra note 22, at 33.
Act.\textsuperscript{32} the Transportation Act allowed carriers to abandon passen-

ger service operations more expeditiously and established a policy

favoring the elimination of much of the passenger rail service.\textsuperscript{33} Section 13a precipitated a sharp decrease in the number of oper-

ating passenger trains.

When the impact of Section 13a on the number of passenger trains operated became clear. Congress initially attempted to re-

peat it.\textsuperscript{34} After failing in this attempt, congressional approaches to

the problem alternated between measures designed to subsidize carriers wishing to abandon unprofitable passenger service\textsuperscript{35} and

limitations imposed to make it increasingly difficult for railroads to
discontinue their existing passenger trains.\textsuperscript{36} By 1969, when most

long-distance intercity service had been discontinued or was being examined by the ICC to determine its future,\textsuperscript{37} the House Com-


\textsuperscript{33}See Thorns, Regulation of Passenger Train Discontinuances, 22 J. PUB. L. 103, 103-08 (1973). The major change effected by Section 13a was the grant of concurrent jurisdiction to the ICC with regard to hearing passenger train discontinuance petitions for trains involved in interstate commerce. See 49 U.S.C. § 13a (1970). Previously a carrier who wished to discontinue a passenger train was required to apply for permission from the regulatory commission of each state through which the train passed. The new provision gave the railroad the option of choosing either a local or national forum for trying its service abandonment petitions. The companies generally chose to plead their cases before the far more receptive ICC. See generally Conant, Railroad Service Discontinuances, 43 MINN. L. REV. 275 (1958); Comment. Federal Supervision of Railroad Passenger Service, 1970 DUKE L.J. 529; Note. Criteria in Passenger Train Discontinuance Cases, 18 N.Y.U. INTRA. L. REV. 127 (1963).

During the period 1958-1968, the number of intercity trains declined more than 60 percent. Fourteen railroads abandoned all intercity service, and over 36 percent of the 1958 intercity routes were completely eliminated. 82 ICC ANN. REP. 5 (1968). The pace of carriers passenger train divestiture is perhaps best examined by detailing the number of discontinuance petitions filed with the ICC over the past several years together with the Commission's response. Three hundred and sixty-seven notices to discontinue passenger service were filed by Class I rail carriers over the period 1959-1970. Seven hundred and sixty-eight trains were permitted to be discontinued while 531 were ordered retained. Two hundred and fifty-one petitions were dismissed or withdrawn. 84 ICC ANN. REP. 18 (1970). In August 1958, 1,448 intercity passenger trains were in operation while a decade later there were only 590. Slightly less than half of the 858 discontinued trains were dropped by the ICC under authority of Section 13a. The remainder were abandoned by authority of state regulatory commissions. 26 CONG. Q. ALMANAC 806 (1970). See ICC ANN. REP. for 1967-1971; 1968 Hearings, supra note 3; 1969 Hearings, supra note 3.


\textsuperscript{36}One leading proposal would have imposed a special pre-termination test. responsive to carrier financial burden and public necessity and convenience. on any passenger trains which represented the last remaining interstate rail service between two points. Included was an amendment to Section 13a which would have authorized a study by the Secretary of Transportation to determine the existing and future potential for intercity railroad passenger service in the United States. S. 3861. 90th Cong., 2d Sess. (1968). Inasmuch as such legislation would have delayed the processing of service abandonment petitions and prolonged the drain on corporate revenues engendered by the continuation of unprofitable service. the railroads strongly opposed it. See generally 1968 Hearings, supra note 3.

\textsuperscript{37}See notes 33-34 supra.
mittee on Interstate and Foreign Commerce held a series of hearings in which thirty-seven pieces of legislation dealing with the problem were presented and considered. Although each of these proposed acts represented a fragmented approach to the complex problem, Congress recognized the need for comprehensive re-evaluation of the function of the passenger train in the national transportation system. Before the year ended both the House and Senate expressed their interest in a long-range plan which would provide for coordination of all modes of intercity passenger transportation.

B. The Rail Passenger Service Act of 1970

In 1970 Congress passed, with little opposition, the Rail Passenger Service Act creating the National Railroad Passenger Corporation, a quasi-governmental entity charged with the responsibility of providing a basic system of nationwide railroad passenger service. The continuing national need for rail passenger transportation was recognized and Congress concluded that federal financial assistance was the most expeditious and practical means of meeting the need. The Act authorized the Secretary of Transportation to designate a basic national rail passenger system over which trains were to be operated by the newly created for-profit, quasi-public corporation designated Amtrak. This corporate entity is not an agency of the United States govern-

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40 Thoms, supra note 22, at 34–36.


45 The Amtrak system was originally called Railpax. There were at least two reasons for the change in name. A consulting firm determined that the name Railpax had relatively poor consumer recall, and that such designation might lead to a suit for copyright infringement by a company that had registered the name Railpak for a waste disposal system. See Thoms, supra note 22, at 49; Wall St. J., Apr. 20, 1971. at 24. col. 1.
ment but a "mixed ownership" corporation under the Government Corporation Control Act. Fifteen directors are authorized by statute—eight to be appointed by the President, three to be elected by common stockholders, and four to be elected by holders of preferred stock. In the enabling legislation, Congress presumed that the corporation would eventually issue equity securities and appointed a panel to advise the directors on ways to increase corporate capitalization. However, Amtrak’s immediate funding was to come from federal grants and guaranteed loans.

Congress authorized the corporation to “own, manage, operate, or contract for the operation of intercity trains.” While Amtrak has elected to purchase a fleet of passenger cars and to purchase or lease a number of locomotives, it has decided not to use its own employees to operate the trains. Instead, contracts for operation and maintenance were negotiated with the private carriers who previously provided such services. These contracts require Amtrak to pay each cooperating carrier an amount equal to the “solely related expenses” incurred in operating Amtrak trains, plus an incremental charge of 5 percent of this amount as a contribution to the allocable costs chargeable to that service and, originally, an additional 4 percent of “solely related expenses” as a contribution to the liability insurance expenses borne by the carrier. Railroads were permitted to participate in the Amtrak system, thus obtaining relief from future passenger operations deficits, upon satisfaction of certain conditions. At the railroad’s option, it could pay, each year for three years, either an amount equal to one-third of 50 percent of its fully-distributed passenger service deficit in 1969, or 200 percent of its avoidable loss during that year in all intercity service over routes designated in Amtrak’s basic system.

Cognizant of the financial difficulties

50 45 U.S.C. §§ 601–02 (1970). This act authorized a grant of $40 million to defray start-up and operating expenses, and a federal guarantee of loans up to $100 million to assist in making necessary capital expenditures for new equipment. The 1972 amendments to the Act have increased the amount of funding to an additional $227 million in grants and $200 million in guaranteed loans.
54 See note 15 supra.
55 Id.
56 See The National Railroad Passenger Agreement, art. 5. §§ 5.1. 7.2 in 1971 Senate Hearings, supra note 3, at 474. 482.
which made the National Passenger Railroad Corporation necessary, the enabling legislation provided a fund of $200 million for use as a source of loans to carriers wishing to cooperate with Amtrak but lacking the funds for the requisite cash contributions.\(^\text{58}\) Under the Act, Amtrak was also permitted to receive equipment or future operating services from the carriers in lieu of cash contributions.\(^\text{59}\) In return for a contribution to Amtrak, the railroad would receive, at its option, either Amtrak common stock of equivalent par value to its payment,\(^\text{60}\) or a tax deduction in the amount of its contribution in the year in which the contribution was made.\(^\text{61}\) Of the twenty railroads electing to cooperate with Amtrak by contracting to operate its trains, only four chose to accept stock in return for their cash contributions.\(^\text{62}\) If a carrier refused to contract with Amtrak, it was required to continue providing passenger service and was denied recourse to the ICC's discontinuance-petition process until January 1, 1975.\(^\text{63}\)

Amtrak officially began operations on May 1, 1971, and its reception by the press, the public, and the courts was generally favorable. However, a suit contesting the constitutionality of the corporation's enabling legislation was immediately filed.\(^\text{64}\)


\(^{60}\) Id.


\(^{62}\) ICC, AMTRAK—STATE OF RAIL PASSENGER SERVICE 48-49 in 1971 Senate Hearings, supra note 3, at 588-89.

\(^{63}\) 45 U.S.C. § 564 (1970). Four major carriers elected not to contract with Amtrak and to continue independent operation of passenger service. These are: Southern Railway, Denver & Rio Grande Western; Chicago, Rock Island & Pacific; and Georgia Railroad. See 1971 Senate Hearings, supra note 3, at 550-51. See also Thoms. supra note 33, at 132. 148.


\(^{65}\) See note 17 supra.

\(^{66}\) Carriers considered filing suit against Amtrak, even before the corporation began operations in early 1971. The railroads considered two legal arguments: first, that the very act of signing a contract with the new corporation relieved them of their common carrier responsibility to provide passenger service without imposing any subsequent duty to allow Amtrak to use their facilities. and second, that Amtrak's intention to merely reimburse the carriers for their losses without paying them a “profit” factor, in effect, deprived them of their property without due process of law. See Thoms. Is Amtrak Legal?, TRAINS, Aug., 1972. at 37. 39.

At least one commentator has tried to explain the railroads' reluctance to initiate legal proceedings:

It has been surprising to some observers that an expropriation argument has not been raised by the railroads. Failure to raise such an argument may be because constitutional law has upheld uneconomic service requirements when good public policy reasons have existed for requiring a public service carrier to perform them. In the case of the Amtrak contracts, the price for joining is generally what one would lose in a year in the passenger business. Since a discontinuance proceeding may take close to a year and since the legal fees incident to discontinuution of a particular train may exceed that
Quincy College and Seminary Corp. v. Burlington Northern, Inc., a three-judge federal district court considered arguments that the National Rail Passenger Service Act allowed the designation of a route system which arbitrarily discriminated against rural communities in favor of metropolitan areas, and that Congress, in allowing a private corporation to determine this system of routes, had unconstitutionally delegated its authority. The court rejected both these arguments in holding that the Act presented a rational and fair plan to salvage what remained of intercity rail passenger service and that Congress had provided sufficient standards to insure the legitimacy of its delegation. With its integrity as a legal entity assured, Amtrak began the practical task of overseeing the management of a national rail passenger transportation system. Like its common carrier predecessors, the corporation found the undertaking expensive. For fiscal year 1972, Amtrak's first full year of operation, it reported a net loss of $143.5 million on revenues of $152.7 million.

III. Difficulties With the Present Concept and Management of Amtrak

Amtrak's organizational problems can be defined and analyzed by considering three factors: the economics of rail passenger transportation; the contractual relationship between the corporation and the participating private rail carriers; and the legal and working relationship between Amtrak and the federal government. Consistent with the experience of railroads in this coun-

train's losses for a year, payment of one year's passenger losses is not necessarily exorbitant or an expropriation of property. In addition to being relieved from the requirement of providing passenger service, the railroad receives either stock in Amtrak or a tax deduction. Thoms, supra note 33, at 135 (footnotes omitted).

68 Id. at 810-11 (1971).
and abroad,\textsuperscript{72} the corporation has reported large losses on passenger operations.\textsuperscript{73} The fact that nearly all Amtrak routes, over both long and short hauls, proved unprofitable in 1972,\textsuperscript{74} indicates that the corporation's operating deficit may be chronic. In view of these losses, the prospect of attracting private capital to a rail passenger transportation company has been\textsuperscript{75} and continues to be bleak.\textsuperscript{76} What was designed as a "for-profit,"\textsuperscript{77} "mixed ownership,"\textsuperscript{78} corporation, has become a commercially nonviable enterprise with only four corporate stockholders.\textsuperscript{79} This situation is dictated by the intractable nature of the economic problem confronting the corporation.

Amtrak's financial difficulties are compounded by the uneasy relationship between the corporation and the contracting railroads which operate and service its trains. Despite assurances from these carriers that they are doing everything possible to make Amtrak successful,\textsuperscript{80} the corporation has had to resort to the courts or arbitration on numerous occasions to compel the railroads to provide better service or to comply with some specific condition of the contractual agreement.\textsuperscript{81} The fairness of the agreement has been challenged by critics. Some argue that contract provisions which compel Amtrak to pay carriers their in-

\textsuperscript{71} See part I A supra.
\textsuperscript{72} See part I B supra.
\textsuperscript{73} Amtrak's financial situation is not healthy. The corporation reported an actual deficit of $147.5 million for calendar year 1972 and a net loss for the first six months of 1973 of nearly $63 million. See 1972 NAT'L R.R. PASSENGER CORP. ANN. REP., at iii (hereinafter cited as 1972 NRPC ANN. REP.). With respect to expenses solely related to routes serviced, the corporation reported a net loss for every route but one, and this one route's small "profit" ($200,000) resulted because two-thirds of the cost of providing service over it is paid by the state of Illinois in accordance with 45 U.S.C. § 563 (1970). See 1972 NRPC ANN. REP., supra at 4. 11. Amtrak clearly expects no short-term solution to its difficulties inasmuch as it has projected a deficit for the fiscal year ending June 30, 1973 of $128.4 million, and a net cash operating deficit for fiscal year 1974 of $95.6 million. 1972 NRPC ANN. REP., supra at 4; Hearings on H.R. 835 Before the Subcomm. of Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess., ser. 93-22, at 12 (1973) [hereinafter cited as 1973 Hearings].
\textsuperscript{74} See 1972 NRPC ANN. REP., supra note 73, at 4.
\textsuperscript{75} Within six months of Amtrak's initiation of operations, the ICC, in its report, AMTRAK—STATE OF RAIL PASSENGER SERVICE, noted:
The future financial needs of Amtrak will almost certainly have to be met by direct government funding and by loans backed by government guarantees. Private investors are most unlikely to be willing to subscribe to Amtrak's equity securities, nor is there likely to be a market for its debt securities unless they are fully backed by government guarantees.
\textsuperscript{76} See generally 1971 House Hearings, supra note 3.
\textsuperscript{77} See 1972 NRPC ANN. REP., supra note 73, at 32-48.
dependently determined costs plus a constant percentage of this amount as a contribution to avoidable costs\(^2\) incurred\(^3\) act as a disincentive to competent and efficient performance by encouraging the railroads to exaggerate service costs.\(^4\) Contracting railroads, particularly the Penn Central Transportation Company, contend that the present scheme of reimbursement seriously undercompensates them because reimbursement is not based on the fully allocable cost method.\(^5\) A reversion to allocable cost accounting for the computation of Amtrak's carrier reimbursements would cause a substantial increase in payments and presumably enlarge the corporation's deficit as well.

Monetary costs aside, the single most important issue is passenger service quality. Amtrak carrier contracts do not demand adherence to a guaranteed performance standard. Further, there are no applicable penalties to deter poor performance.\(^6\) Therefore, Amtrak is largely dependent upon voluntary railroad cooperation in providing clean, courteous, and on-time performance. If customer mail is an accurate index of performance quality, carrier efforts have been less than successful.\(^7\) One of the most critical deficiencies has been a relatively poor schedule-keeping record.\(^8\) During 1972, on-time performance for all of Amtrak's 1,326 weekly trains averaged approximately 75 percent.\(^9\) Although various causes have been identified,\(^10\) the principal responsibility

\(^{2}\) See note 15 supra.

\(^{3}\) National Railroad Passenger Agreement, 1971 Senate Hearings, supra note 3. at 474.

\(^{4}\) See, e.g., 1971 Senate Hearings, supra note 3. at 89-90 (statement of Anthony Haswell); 1971 House Hearings, supra note 3. at 570.

\(^{5}\) See note 15 supra. See also 1973 Hearings, supra note 73, at 13-14 (statement of Roger Lewis).


\(^{7}\) Of the consumer mail received by Amtrak from February through December, 1972, 58.9 percent was critical of service quality, complaining of rude personnel, equipment malfunctions, and late arrivals. See 1972 NRPC ANN. REP., supra note 73, at 24-25.

\(^{8}\) The problem of late train arrivals has been the subject of comparative and analytical study. Results indicate that Amtrak's times are slower than established records in nearly every case. See TRAINS, June, 1972, at 40. The Department of Transportation in its Report to Congress on the Rail Passenger Service Act of 1970, found that for the first eleven months of 1972 short haul routes averaged 82 percent on-time performance while long haul routes over the same period averaged only 53 percent. DEP'T OF TRANSP., REPORT TO CONGRESS ON THE RAIL PASSENGER SERVICE ACT OF 1970, at 22 (1973) [hereinafter cited as DOT REPORT].

\(^{9}\) 1972 NRPC ANN. REP., supra note 73, at 6 and Tables III-V, at 7-9.

\(^{10}\) The Department of Transportation lists "slow orders", i.e., delays due to bad track or roadbed, as the principal cause of Amtrak's poor on-time record. Delays due to in-station equipment servicing and freight train interference are apparently of relatively minor significance. See DOT REP., supra note 88. at 28. In contrast, the National Association of Railroad Passengers (NARP) views station servicing and freight train interference as major causes of delay and consequently blames both railroad uncooperativeness and Amtrak complicity for the worsening on-time record. See 1973 Hearings, supra note 73, at 259, 265 (statement of Anthony Haswell). The statement also provides data regarding on-time arrivals of Amtrak trains for the first quarter of 1973 and concludes that the situation is worsening. See 1973 Hearings, supra note 73, at 252.
Railroad Passenger Problem

for service delays rests with the contracting railroads that operate the trains.

While Amtrak is not "an agency or establishment of the United States Government,"91 dependence on governmental subsidies has compelled it to conduct operations as if it were a public agency. The level of government funding92 has been criticized as inadequate to meet Amtrak's needs and to provide a fair test of its potential for success.93 The manner of fund disbursement has aggravated the problem of insufficient funding. The fund disbursement method used is the traditional annual congressional appropriation for each fiscal year.94 Because funds are appropriated on a short-term and uncertain basis, it is difficult for Amtrak to plan efficient programs for route expansion or curtailment, equipment acquisition, pricing, and general capital expenditures. Amtrak's enabling legislation specifically makes it subject to the provisions of the Government Corporation Control Act95 and gives the Comptroller General broad authority to audit and verify its accounts.96 Such financial control further inhibits the corporation's ability to respond quickly to varying market conditions. Though Amtrak's penetration of the travel market is estimated at only 4 percent of the total traffic offering,97 there are indications that governmental financial controls are increasing.98

Subtle, yet significant, political influence on the corporation has grown out of Amtrak's present relationship with the government. It may be beneficial for a service organization dependent upon tax monies for its existence to be subject to some political pressure. Political input may engender a more democratically responsive relationship between the corporation and its financial supporters, both consumer and taxpayer. However, in Amtrak's case, evidence suggests that political influences have had a less than constructive effect. Congress has exercised its power to induce the corporation to establish unwarranted special services,99 while fail-

93 See Thomo, supra note 22, at 43-44. See generally 1971 Senate Hearings and 1971 House Hearings, supra note 6.
94 See, e.g., 1971 Senate Hearings and 1971 House Hearings, supra note 3; 1973 Hearings, supra note 73.
99 The most notorious example of this conduct resulted in train service between Washington, D.C. and Parkersburg, W. Va. Although the route had a geographically undulating profile unsuited to high speed/low tare equipment. Amtrak employed an expensive Turbo-train which, in some circles came to be known as the "Harley Staggers Special" named
ing to insure that these services were adequately funded. Influence has been applied to reroute trains or to prevent their rerouting for noneconomic reasons, to reprimand obliquely the corporation’s top-level management, and to alter on-board train regulations. The exact impact of such political activity on Amtrak’s operational and financial performance is difficult to assess. However, in a business where strict cost control and efficient customer service are essential to survival, extrinsic influences which subordinate these goals to partisan political advantage can have only an adverse effect.

IV. The British System


Because of the complicated administrative structure of the transportation industry in Great Britain, British railroad passenger service cannot be discussed without placing it in the context of the governmental structure that manages the overall operations of British rail carriers. British railways, like those in most other industrialized countries, have long been subject to some degree of governmental regulation. Before the general conversion of British industry from private to public management in the late 1940's, the government exercised significant control over certain transportation industries by means of the public corporation. Public control on a national scale did not occur until enactment of the

...after the Chairman of the House Interstate and Foreign Commerce Committee. Passenger levels proved so low that the service was discontinued on May 5, 1973. See Traffic World, Apr. 16, 1973, at 29.


101 Plans to expedite the Chicago-Miami service by changing its route were abandoned because it was politically desirable, if not operationally efficient, to keep the train on its present route. Amtrak would have tailored its Mexican service to fit political rather than terrestrial geography if the railroads which were to provide the service did not, in effect, veto the proposal—in one case by tearing down a station the day after an Amtrak inspection team had viewed it. Chicago Sun-Times, Jan. 3, 1973, at 10, cols. 1-2.

102 The 1972 amendments to the National Railroad Passenger Act somewhat arbitrarily reduced the salary of the president of Amtrak from $125,000 to $60,000. 45 U.S.C. § 543(d) (1972).

103 A written complaint by the Chief Justice of the United States to the Secretary of Transportation about pipe and cigar smoking in certain “Metroclub” cars was sufficient to cause the prohibition of such activities in late 1972. Trains, Feb., 1973, at 9.


Transport Act of 1947.\textsuperscript{107} The Act, like many other statutory plans promoting the "nationalization" of British industries,\textsuperscript{108} utilized the public corporation as a means of unifying disparate private enterprises into a single public organization. The public corporation was designed to eliminate repetitive operations, thus enhancing economic efficiency.

After the Second World War, railways were particularly in need of corporate restructuring.\textsuperscript{109} The Act of 1947 accomplished this reorganization by establishing a public corporation with two primary components: a policy-making unit to integrate different modes of transportation and a series of administrative bureaus to manage specific transport operations. The first unit was the British Transport Commission whose members were appointed by the Minister of Transport. The Commission was responsible for all modes of internal public transportation with the exception of coastal shipping.\textsuperscript{110} In effect, the Commission performed the function of a super board of directors, replacing the boards of each of the private companies whose operations it directed.\textsuperscript{111} Transportation service administrative units, called Executives, replaced the upper level management teams of the previously privately operated companies.\textsuperscript{112}

Under the 1947 Act, railways were managed by a hierarchical structure that insulated routine service supervision from political interference while maintaining political input to the organization's policy-making division. The British Transport Commission, as a public corporation, was not an agent of the Crown or a governmental department.\textsuperscript{113} The Commission was designed to operate much like a private corporation: its administrative personnel were not subject to civil service regulation; its financing was not a part of the regular national budget and therefore was not subject to annual alterations; it could issue stock, subject to Treasury approval; it could negotiate independently with whatever labor organizations it chose; and it could, subject to some limitations,

\textsuperscript{107}Transport Act of 1947, 10 & 11 Geo. 6. c. 49.
\textsuperscript{112}Transport Act of 1947, 10 & 11 Geo. 6. c. 49.
\textsuperscript{113}Transport Act of 1947, 10 & 11 Geo. 6. c. 49.
establish its own pricing policies.\textsuperscript{114} As an independent entity, the Commission was subject to national and local taxation or levies.\textsuperscript{115} While not directly subject to Parliamentary control, all policy decisions could be vetoed by the Minister of Transport who was responsible to Parliament.\textsuperscript{116} Through this veto mechanism, national transportation policy could influence Commission activities in a political way without inhibiting the Commission's freedom to develop specific implementation measures. The Executives, which were responsible to the Commission and which supervised the day-to-day operations of their respective modes of transportation services, were even further removed from direct Parliamentary control. The Railway Executive adopted a "functional system" of organization, that is, a rigid system of departmental control with a centralized decision-making bureaucracy.\textsuperscript{117} Revenues exceeded costs for those years in which nationalized carrier passenger service was operated under the direction of the original Railway Executive.\textsuperscript{118}

The principal organizational devices developed by the Transport Act of 1947, the Executives and the Transport Commission, were later abolished; the former, under the authority granted by the Transport Act of 1953,\textsuperscript{119} and the latter, under the Transport Act of 1962.\textsuperscript{120} However, the essence of the 1947 Act remained: an organization, separate from the government, invested with government-like powers to set transportation policy and enterprise-like freedom to execute it. In allowing the Minister of Transport to eliminate the Executives,\textsuperscript{121} the 1953 Act attempted to accomplish two objectives: first, to concentrate control over major capital and cost expenditures in one administrative unit; second, to decentralize the management of railway operations throughout several regional divisions. The financial control over railways, which previously rested in the Executive, was transferred to the Commission. The Commission's operational responsibilities were delegated to new area authorities headed by regional managers.\textsuperscript{122} The 1962 Act replaced the Transport Commission

\textsuperscript{114} See Robson. \textit{The Public Corporation in Britain Today}, 63 \textit{Harv. L. Rev.} 1321, 1329–42 (1950).
\textsuperscript{115} Transport Act of 1947, 10 & 11 Geo. 6, c. 49, § 10.
\textsuperscript{116} See Robson. \textit{supra} note 114, at 1325–26.
\textsuperscript{117} For a more complete discussion of the organization of the Executives see A. Pearson, \textit{supra} note 110, at 63–64. See also H. Clegg & T. Chester, \textit{The Future of Nationalization} 108–19 (1953).
\textsuperscript{118} A. Pearson, \textit{supra} note 110, at 65–66.
\textsuperscript{119} Transport Act of 1953, 1 & 2 Eliz. 2, c. 13.
\textsuperscript{120} Transport Act of 1962, 10 & 11 Eliz. 2, c. 46.
\textsuperscript{121} Transport Act of 1953, 1 & 2 Eliz. 2, c. 13, § 25.
\textsuperscript{122} A. Pearson, \textit{supra} note 110, at 73–75, 76–87.
with several Boards each of which was responsible for a specific transportation mode. The Railways Board took over the role of financial controller, previously exercised by the Commission, and delegated further managerial responsibilities to the regional public authorities.

During the period from 1953 to 1967, responsibility for railway services shifted to the regional level. It was also during this period that service costs began to create regular and substantial deficits.

B. The Transport Act of 1968

Several of the most important innovations introduced by the Transport Act of 1968 related to railway passenger service operations. The Act authorized the Minister of Transport to designate Passenger Transport Areas. Each area constituted a geographical unit in which all transportation services were to be integrated in an effort to minimize wasteful duplication of services, reduce costs, and allow accommodation of the particular transportation requirements of the local population. The area administrative structure was similar to that created by the 1953 and 1962 Transport Acts. In each area, a Passenger Transport Authority and an Executive were established. The Authority functioned as a policy-making unit which coordinated different transportation modes and schedules, set rates, and determined the quantity and quality of transportation service required in its particular area. The Executive was given responsibility for carrying out Authority policies by providing the required service, or by making service arrangements with the appropriate nationalized carrier, including the Railways Board. This administrative structure is conducive to provision of a balanced transportation system tailored to local needs. Furthermore, the national transportation system becomes more efficient because it can utilize large public corporation carriers operating over a coordinated grid of routes.

In financial matters, both the Executive and the Authority have

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123 Transport Act of 1962, 10 & 11 Eliz. 2, c. 46, § 1.
124 Id. §§ 2-6. See also A. Pearson, supra note 110, at 88-100.
126 Transport Act 1968, c. 73.
127 Transport Act 1968, c. 73, § 9.
128 See notes 119-24 and accompanying text supra.
129 Transport Act 1968, c. 73, § 9.
130 Transport Act 1968, c. 73, § 10.
131 Id.
the statutorily defined obligation to see that, to the fullest extent possible, revenues cover operating costs.\textsuperscript{132} Once satisfied of an existing need, the Authority, if it agrees to provide the necessary funding, may authorize implementation of a particular passenger service notwithstanding the Executive's refusal to sanction such service because of projections that costs incurred will exceed revenues obtained.\textsuperscript{133} Thus, the costs of an unrenumerative service are not charged against the Executive operating budget and, therefore, do not distort cost figures of services which are potentially profitable or maintainable without a deficit. In this way, the Executive's true efficiency can be more accurately analyzed.

The Act applies this same funding concept to the provision of passenger service for the entire nation.\textsuperscript{134} If a regional Authority determines that a particular rail passenger route is necessary, it can request the Railways Board to provide such service even if the route would be unprofitable. However, the Railways Board is generally obligated to discontinue or deny applications for services which cannot be provided at a profit or at cost.\textsuperscript{135} The decision as to whether the service will be provided is made by the Minister of Transport\textsuperscript{136} after evaluating cost figures presented by the Railways Board and public necessity arguments presented by the regional Authority. If the Minister decides that the service is necessary, despite its financially unremunerative prospects, he may authorize a specific government subsidy covering the costs of that particular service. Two features of the subsidy are notable. First, it is designed to cover a wide range of costs associated with the provision of a particular service. Included, in addition to out-of-pocket expenditures, are allocable costs such as a depreciation charge on rolling stock, a contribution to maintenance-of-way, and an amount for management expenses. Second, the subsidy is a fixed grant calculated to cover all costs for a specified period, not to exceed three years, and it is not subject to review until the expiration of that period.\textsuperscript{137} This latter characteristic builds efficiency into the administrative funding process. The Railways Board cannot furnish less service than the Authority has requested because the minimum service level is stipulated in the subsidy pertaining to that service. Yet, because the subsidy is provided for an unreviewable period, service revenue increments

\textsuperscript{132} Transport Act 1968, c. 73, §§ 11, 15(3), 41(2).
\textsuperscript{133} Transport Act 1968, c. 73, § 15(3).
\textsuperscript{134} Transport Act 1968, c. 73, § 39.
\textsuperscript{135} See Allen. \textit{supra} note 23, at 23.
\textsuperscript{136} Transport Act 1968, c. 73, § 39(1).
\textsuperscript{137} Transport Act 1968, c. 73, §§ 39–40.
in excess of projected levels will inure to the Board's benefit. The Board thus has an incentive to promote public service and to operate as efficiently as possible.\textsuperscript{138} Under this funding plan, the Board received approximately $150 million in subsidies during 1971 to subsidize unremunerative but socially desirable rail passenger service.\textsuperscript{139}

Although the 1968 Act has drawn criticism,\textsuperscript{140} its general effect has been to increase the amount of rail passenger service and to improve the general quality of the service. The Act has resulted in the gradual conversion of British Rail into a passenger-dominated railroad. In 1971, the system carried nearly 823 million passengers and accounted for approximately 15 percent of total traffic on domestic trips of over a hundred miles.\textsuperscript{141} Despite the impact of an improved highway system and increased public use of the automobile, the railway system has been recovering passengers at a rate of 5 percent per year.\textsuperscript{142} In 1971, passenger revenues accounted for 54 percent of British Rail's total receipts.\textsuperscript{143} Although the factors responsible for this resurgence are not easily defined, the traffic growth seems primarily due to improvements in speed and service.\textsuperscript{144}

While the British system is viable, it is not perfect. In 1971, direct government subsidies for uneconomic passenger service amounted to over 20 percent of British Rail's passenger revenues. Even with this additional funding, the system incurred an overall deficit of over $35 million in that year.\textsuperscript{145} The British experience has been that efficiently provided rail passenger service can attract substantial traffic. The system has also demonstrated that such service cannot be provided unless the government bears some of the economic costs. Although the British passenger railway system still confronts difficulties,\textsuperscript{146} it has managed to pro-

\textsuperscript{138} See Allen, supra note 23, at 23–24.
\textsuperscript{139} See 1971 BRITISH RY. BD. ANN. REP. AND ACCOUNTS. The relevant figure is 63.1 million. Id. at 7.
\textsuperscript{140} See, e.g., British Railways: Or How to Lose Money at a Profit, FORBES, May 1, 1971.
\textsuperscript{141} Trzaskoma, supra note 26, at 32.
\textsuperscript{142} Id.
\textsuperscript{143} 1971 BRITISH RY. BD. ANN. REP. AND ACCOUNTS, at 7.
\textsuperscript{145} 1971 BRITISH RY. BD. ANN. REP. AND ACCOUNTS 1971, at 7. 110.
\textsuperscript{146} It should be noted that recent shifts in nationalized transportation policy throughout Europe and Britain have encouraged steps to "put the railways on a more strictly commercial footing and to reduce their public service obligations." See SEVENTEENTH ANN. REP. AND RES. OF THE COUNCIL OF MINISTERS 28 (1970). In Britain particularly, because
vide an attractive service which meets the needs of local areas while equitably distributing operational costs.

V. A NEW MODEL

The geographic and economic operating conditions of British railroads are quite different from those of American railroads. Thus, while the British approach to the rail passenger problem has been useful and constructive, it cannot and should not be applied without modification to the unique problems inherent in the American railroad transportation system. However, the British system embodies two concepts of general applicability which have features well-suited to Amtrak's difficulties—the public corporation and the regional authority. If the public's perceived need of an efficient and modern American rail passenger system is to be met, an organization that can provide the desired service of rising costs, there have been proposals to radically curtail rail service of all types. In a government study entitled Rail Policy Review a number of drastic measures are proposed. For example, a reduction of track from 11,700 to 7,000 or perhaps 3,000 miles; the elimination of 123 of the 200 presently subsidized passenger services; and the contraction of the daily system-wide traffic load by 250,000 passengers and 180,000 tons of freight. If the report's conclusions are curt the reasons for them are certainly not cryptic. The 1972 deficit for all rail services is currently estimated at $90 million, projected to be $160 million in 1973, and over $230 million by 1976. The Times (London), Oct. 8, 1972, at 1, col. 7.


148 See part IV A supra.

149 See part IV B supra. It should be noted that the term "authority" as used by the British statutes does not have the same technical significance it has in American usage. One commentator has noted:

In British usage the term ‘public authority’ has an entirely different connotation, being a generic term applied to local governmental organizations, agencies, officials, and their anonymous implementors. Cities, boroughs, towns, villages, parishes, boards, commissions, and even local public corporations are often included in the term.

Tilden, Problems Underlying the Control of the Public Authority/Corporation, 1 NEW ENG. L. REV. 85, 87 (1966).

150 The poll conducted by Louis Harris & Associates for Amtrak indicated that 73 percent of the public recognized that “along with airline, bus, and car travel, train travel between cities is a very important part of America’s transportation system;” 82 percent of the public felt that “many people prefer to take a train for a pleasure or business trip, and they should have the opportunity to travel this way;” 56 percent of the public considered a policy of “developing fast, comfortable, intercity passenger trains” very important; and 54 percent thought a very important priority was “improving the quality and availability of rail passenger travel for passengers on trips 300 miles or more one way.” The poll noted that 45 percent of the public feels that the federal government has a responsibility to see that rail passenger service is maintained on routes between major cities and 53 percent of the public believes that “the federal government has a responsibility to see that vital and important passenger services are improved.” Even more striking is the public’s apparent willingness to pay for such service in the form of federal subsidies. Sixty-nine percent of those surveyed supported the idea of “federal assistance in providing railroads with loans to buy new equipment;” 56 percent wanted “federal investment for fundamental changes
must be designed with deference to established legal precedent but without sacrificing the flexibility needed to meet the public necessity.\textsuperscript{151} Utilizing the two major concepts of the British Transport Act of 1968, the proposed model posits an interacting system of governmental entities that exploit the features of American federalism in order to meet a decentralized demand for rail passenger service with a supply provided by an efficient, centralized unit.

In the proposed model, a public corporation assumes the operational and administrative responsibilities currently vested in the National Railroad Passenger Corporation. The corporation would own equipment and operate trains with its own employees, including all on-board personnel. Major equipment maintenance would be performed at the corporation’s own repair facilities. Except for providing routine maintenance and inspection of corporate equipment, private rail carriers would have no connection with system operations. The corporation would compensate each railroad whose route it uses and could expend its own funds on facilities to improve safety and efficiency. Management would be independent of other federal agencies or departments, but long-range policy decisions would be subject to review by the Secretary of Transportation.

Regional railroad passenger transportation agencies (RPTAs), the model’s second component, would serve to identify and channel regional demands for rail passenger service. Each of the several RPTAs would consist of a number of contiguous states with similar service needs. Each RPTA would have a policy-making board composed of a single federal representative and two representatives from each state in the region. The state representatives would be appointed by the Governors of their respective states; the federal representative would be selected by the Secretary of Transportation. Each board would assess its area’s need for rail passenger transportation, construct a schedule of proposed routes, in tracks and equipment that would improve train travel;’’ and 60 percent would back major “federal investment to make American passenger train travel as good as any in the world.” When asked about the consequences of ending passenger train travel between many cities because of deficits incurred on such routes, 72 percent of the public concluded that such a reduction in service would certainly create “more harm than good.” See A Survey of the Public Mandate for the Current Passenger Market and the Potential Market for Intercity Rail Passenger Travel in the United States, conducted by Louis Harris & Associates, Inc., June, 1972, at 1-3.

\textsuperscript{151} It is generally unproductive to examine the concepts of public necessity or public interest without reference to a particular set of facts. Public interest and need in this area must be defined with respect to other factors of national and local significance. Without a set of particular facts, any discussion of public need or interest in rail passenger service must necessarily be inconclusive. See, e.g., 1969 Hearings, supra note 3, at 409-10.
and estimate the number of trains required to meet the projected need. Each RPTA would have authority to consult with other RPTAs to coordinate route assessments when consultations are necessary or desirable. After determining its own service requirements, a regional agency may request the national public corporation to operate a sufficient number of trains to meet area demands. Through the RPTAs, decisions about regional service requirements are made, not by a centralized decision-making process, but by individuals best able to estimate local needs.

If the public corporation, after reviewing the service request of a regional agency, decides that it can provide the service either at a profit or at cost, the service must be provided. However, if the corporation determines that the service cannot be operated without a financial deficit, the corporation may refuse to provide it. Where service could be provided only at a loss, the regional agency and the public corporation would present their respective arguments before the ICC. The Commission would make its determination on the strength of the regional agency's demonstrated need. If it decides the service is necessary, the Commission will calculate the probable deficit over a fixed period, not to exceed three years. This deficit will be subsidized by the individual RPTA and the federal government on an equal basis from funds established for this purpose. The required subsidy would be supplied to the public corporation for a specific agreed term. Fixing the subsidy over a given period serves to encourage more efficient service. If, during the period, traffic volume should increase in response to the provision of higher quality service, any increment in revenue would inure to the corporation's benefit. The applicable agreement would specify minimum service requirements in order to inhibit deterioration of service. The model thus provides for the creation of an organization with the independence and incentive to operate an efficient rail passenger service system. The necessity for service will be determined by those who will ultimately use it. The costs of providing unprofitable service will be equitably allocated between those who directly benefit and the nation at large.

A. The Public Corporation

Under existing transportation requirements and economic realities, the public corporation is a governmental entity particularly well-suited to deal with the rail passenger problem in the United
States. Since its first non-eleemosynary application in the United States, the public corporation has been recognized as an efficient organizational form for dealing with situations in which the public need for service is great, but attraction of private capital is virtually impossible because of the absence of profit-making possibilities. Given its past financial performance, Amtrak's current "mixed-ownership" status is clearly a fiction. It was apparent at the time of incorporation that the very nature of the business undertaking would repel private investment and ensure dependence on federal support in one form or another. For that reason, at least one commentator suggested Amtrak be initially organized as a public corporation. The numerous disadvantages of a mixed-ownership form in an inherently unprofitable business have spawned attempts to confront the problem of unprofitable rail service which contain elements of a public

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152 It is not a simple matter to define the first application of the public corporation form of enterprise organization to a noncharitable institution in the United States. If the amorphous category of public-utility type enterprises granted public charters by the federal and state governments are put aside, the Panama Railroad Company, purchased by the United States government in 1904, is the strongest candidate. See Abel, The Public Corporation in the United States, in Government Enterprise 183 (W. Friedmann & J. Garner eds. 1970). For a brief description of some early United States-owned public corporations, see Culp, Creation of Government Corporations By The National Government, 33 Mich. L. Rev. 473, 473-86 (1935).


154 See notes 74-79 and accompanying text supra.


156 R. W. Harbeson commented:

The possibility that the present arrangements may result in inadequate financing, plus the likelihood that in any event the bulk of the financial support will be provided by the government, suggest that NRPC might better have been established as a strictly public corporation with full financial responsibility for rehabilitating rail passenger service. After all, in the absence of government guarantees, it seems scarcely reasonable or prudent to rely upon substantial private financial assistance for a venture in which the most that can reasonably be expected is the avoidance of operating deficits. . . . In general, it would have been simpler, more realistic, and more conducive to accomplishing the goals of the present measure if NRPC had been established as a public corporation.


157 One commentator has noted in this connection:

As a permanent arrangement, the mixed ownership enterprise appears to afford few tangible advantages. [With a public corporation] the government does not have to rely on private investors to provide equity capital. Access can be had to private money markets through the sale of revenue bonds without sharing ownership. The purpose of a public enterprise is to accomplish a public purpose. Profits, if any, are incidental to the basic purpose. The object of private enterprise is to earn a profit for the proprietors. A mixed enterprise is likely to accomplish neither of these objectives very well.

corporation scheme. Both commentators and courts have recognized the advantages of an administrative entity which exercises power free of market and governmental pressures, while retaining the flexibility and adaptability of a private enterprise.

Although "public corporation" has been variously defined, a consistent definitional element has been complete or controlling government ownership. In order to align corporate structure and economic reality, the proposed entity must be made a "government corporation" as defined by the laws of the United States: it must be a corporation owned or controlled by the federal government. The ability of Congress to create public corporations, although not a specifically enumerated power, has been consistently recognized since the United States Supreme Court's decision in McCulloch v. Maryland.

The corporation's legal relationship to the states in which it conducts operations is far less clear. It has been acknowledged that a federal corporation is subject to the valid laws of the states in which it operates insofar as these laws bear upon property and business operations and to the extent that such laws do not conflict with lawful federal control or interfere with governmental

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158 A relatively early suggestion for a public corporation to provide rail passenger service was made as one of a number of alternative proposals in the Doyle Report, a report prepared for the Senate Commerce Committee in 1961: "A third possibility would be to form a public (Federal) corporation in which the Federal Government would have control and full operating responsibility." 1968 Hearings, supra note 3. at 129. A much more recent attempt to solve the financial problems associated with rail freight transportation in the northeastern United States makes use of a not-for-profit corporation which would acquire and maintain designated rail lines. See S. 1031, 93d Cong., 1st Sess. (1973).


163 17 U.S. (4 Wheat.) 316 (1819) (upholding the power of the Congress to establish a Bank of the United States). In its discussion of congressional power in the area of government enterprise, the Court noted:

It is not, of itself, unconstitutional in Congress to create a corporation. Corporations are but means. They are not ends and objects of government. No government exists for the purpose of creating corporations as one of the ends of its being. They are institutions established to effect certain beneficial purposes; and, as means, take their character generally from their end and object. They are civil or eleemosynary, public or private, according to the object intended by their creation. They are common means, such as all governments use. . . . Congress has duties to perform and powers to execute. It has a right to the means by which these duties can be properly and most usefully performed, and these powers executed.

17 U.S. at 325-26.
functions.\footnote{See Colorado Nat'l Bank v. Bedford, 310 U.S. 41 (1940); Baltimore Nat'l Bank v. State Tax Comm'n, 297 U.S. 209 (1936); Federal Land Bank v. Priddy, 295 U.S. 229 (1935); First Nat'l Bank v. Fellows, 244 U.S. 416 (1917); South Carolina v. United States, 199 U.S. 437 (1905).} However, there is also authority holding that a state law that substantially incapacitates a federal corporation and prevents it from operating according to its congressional mandate may be unconstitutional.\footnote{See Flint v. Stone Tracy Co., 220 U.S. 107 (1911); McClellan v. Chipman, 164 U.S. 347 (1896).} Since there is no federal law of corporations, a public corporation possesses only those powers which Congress confers by specific legislative enactment.\footnote{See Seidman, supra note 159. at 93.} Clearly Congress can use its powers to delimit the extent and character of a public corporation's responsibilities for the purpose of insulating that corporation from a number of state regulatory functions.\footnote{See Pittman v. Home Owners' Loan Corp., 308 U.S. 21 (1939); Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921).} The decisions have not clearly defined the limits of this congressional power in light of state attempts to control aspects of a public corporation's operation that are not strictly an exercise of constitutional power for a governmental purpose. The National Rail Passenger Service Act exempts Amtrak from state legislation that attempts to regulate rates, routes, and services pertaining to the transportation of railroad passengers,\footnote{45 U.S.C. § 546(c) (1970).} but subsequent litigation has raised doubts about the adequacy of provisions for removing a public corporation from all state regulation.\footnote{The litigation arose out of two "raids" by state officials in Oklahoma and Kansas in the summer of 1972 on Amtrak trains. The raids were carried out to enforce laws in the states which prohibited the sale of alcoholic liquor by the drink. See N.Y. Times, July 15, 1972, at 54, col. 2. See also N.Y. Times, Sept. 10, 1972, at 76, col. 1. Amtrak instituted legal action in both states asking for a permanent injunction against state officials to prevent them from stopping trains and confiscating liquor served aboard them. Amtrak contended that its enabling legislation established a comprehensive federal scheme of regulation for intercity rail passenger service, including on-board food and beverage service, thereby preempting state regulation. It argued further that the beverage service on its interstate trains has such an insubstantial connection with the "health, welfare, morals, safety and temperance" of the states' citizens that enforcement of "open saloon" laws against the trains violates the fourteenth amendment's due process clause. The states contended that Amtrak's liquor-serving practices aboard trains that crossed their borders violated the twenty-first amendment. See Brief for Plaintiff, National R.R. Passenger Corp. v. Harris, 354 F. Supp. 887 (W.D. Okla. 1972). The federal district court in Oklahoma agreed with Amtrak's position and granted the prayed-for permanent injunction. National R.R. Passenger Corp. v. Harris, 354 F. Supp. 887 (W.D. Okla., (1972). See also Note, 6 CREIGHTON L. REV. 249 (1973). The federal district court in Kansas disagreed and refused to grant Amtrak relief. National R.R. Passenger Corp. v. Miller, 358 F. Supp. 1321 (D. Kan. 1973).} In any case, it is important that the model public corporation be given a specific congressional exemption from any state control over operations. Although the scope of the exemption will necessarily be determined by the courts, it is evident that the exemption must be...
given a broad interpretation if the corporation is to retain the flexibility needed to provide efficient public service.\textsuperscript{170}

In order to exploit most fully the advantages of the public corporation form, the model corporation must be given a clear legislative mandate to carry on independent operations using its own employees. Thus, the corporation would require a minimum of "assistance" from those private carriers over whose lines it operates. The issue of independent operation has been frequently discussed.\textsuperscript{171} Although Amtrak’s enabling legislation, as amended, exhorts the corporation to "directly operate and control all aspects of its rail passenger service,"\textsuperscript{172} and requires the Secretary of Transportation to prepare recommendations as to how an independent operation might best be effected,\textsuperscript{173} the corporation has failed to place its own employees in a number of important positions.\textsuperscript{174}

Another important issue is the applicability of federal civil service laws to employees of the corporation. The Ramspeck Act\textsuperscript{175} of 1940 makes the application of civil service requirements to government-owned corporations a matter for Presidential discretion. Since rail passenger service demands innovative marketing and operating practices and emphasizes courteous and efficient service, the rigidities of the civil service system make it inferior to the system employed by private industry in which promotion is based on merit.\textsuperscript{176} The model public corporation

\textsuperscript{170} Perhaps what is needed is a grant of authority as broad as that given to the Tennessee Valley Authority (TVA), which the courts have found to be relatively free from state regulation and control. See 16 U.S.C. § 831 (1970). See also TVA v. Kinzer, 142 F.2d 833 (6th Cir. 1944); City of Middlesboro v. Kentucky Util. Co., 248 Ky. 833, 146 S.W.2d 48 (1940).


\textsuperscript{172} 45 U.S.C. § 545 (1972).


\textsuperscript{174} There is some controversy as to the extent Amtrak’s own personnel should participate in the operation and staffing of its trains. The National Association of Railroad Passengers has proposed legislation which would require the corporation to directly employ all persons who issue, collect, handle, assign, or otherwise control tickets, cash, receipts, and reserved space assignments, and all other persons whose full-time occupation is solely related to the provision of intercity passenger service provided by the Corporation. 1973 Hearings, supra note 73, at 281. On the other hand the Department of Transportation believes that Amtrak has done all it can practically do to operate its trains with its own employees and further attempts in this area might well be counterproductive. DOT REP., supra note 88, at 58–66. It is nonetheless true that on-board train functions are largely undertaken by employees of the private carriers. 1972 NRPC ANN. REP., supra note 73, at 23.


\textsuperscript{176} In discussions of the inherent advantages of a public corporation form of enterprise organization, a number of commentators have singled out flexibility of personnel manage-
must be exempted from civil service laws so that it can manage its personnel practices with the same degree of freedom enjoyed by private competitors supplying transportation services. 177

Just as the model public corporation must be free of state regulation and control if it is to use its inherent advantages most effectively, it must also be free from some of the effects of the Interstate Commerce Act. 178 The National Rail Passenger Service Act recognized the importance of this freedom and provided that Amtrak, while generally regulated by the Interstate Commerce Act, would not be subject to the Act's provisions regarding regulation of fares, abandonment of lines, or regulation of routes and services. 179 The Act did provide, however, that the ICC would have jurisdiction over attempts by Amtrak to discontinue trains after July 1, 1973, 180 and gave the Commission authority to prescribe regulations "as it considers necessary to provide safe and adequate service, equipment, and facilities for intercity rail passenger service." 181 Neither of these ICC regulatory functions should be applied to the model public corporation. The model corporation's relationship to the ICC should be such that the Commission serves primarily as an accounting service, calculating specific service costs after making policy decisions as to whether federal financial support is warranted. The present law would impose an intolerable burden on the public corporation since considerable delays may be incurred before a service can be discontinued. The delays would be necessitated by notice requirements, 182 and exhaustion of appeals. ICC decisions in discontinuance proceedings 183 may be appealed first to a three-judge district court 184 and ultimately to the Supreme Court. 185

177 The experience of TVA with respect to the civil service laws is instructive. TVA's enabling legislation broadly exempts the Authority from the application of civil service laws, at least as they bear upon the hiring and discharging of employees, 16 U.S.C. § 831b. The civil service laws themselves specifically exempt the Authority from complying with a number of detailed provisions dealing with employee benefits. 5 U.S.C. §§ 305, 4102(a) (1)(B), 4301(1)(1), 5533(d)(4), 5541(2) (viii), 5595(a)(2)(vii), 5596(c), 5911(2), 8331(1) (vi), and 8901(1)(iii). At least one commentator believes that the civil service exemption policy is one reason for the Authority's acknowledged success. See C. PRITCHETT, THE TENNESSEE VALLEY AUTHORITY, A STUDY IN PUBLIC ADMINISTRATION 267-71. 305-09 (1942).


public corporation must be allowed to discontinue any service it
determines cannot be provided without financial loss, upon giving
the public a thirty-day notice of such an intention. Unless a
regional passenger transportation agency expresses an intention to
assist in funding, the service should be discontinued at the end of
thirty days without the permission of or resort to any regulatory
agency, state or federal. Similarly, the ICC must not be allowed to
propose regulations pertaining to the character of the service
provided. To be successful, the corporation requires independent
decision-making about the kind of service that can best be market-
ed in any given area.\textsuperscript{186}

The model public corporation would be wholly govern-
ment-owned. Nearly every currently chartered corporation of this
type is subject to the Government Corporations Control Act.\textsuperscript{187}
The Act has been criticized\textsuperscript{188} primarily because of the rather
strict control it imposes over the financial dealings of those gov-
ernment corporations to which it applies. The Act prescribes
accounting and auditing procedures which vest a great deal of
authority over corporate expenditures in the Bureau of the Budget
rather than in the corporations themselves.\textsuperscript{189} One of the dis-
tinguishing components of any public corporation is its ability to
manage its own financial resources, regulating revenues by con-
trolling the number and character of service offerings while con-
trolling costs by varying spending for capital expenditures and
ordinary purchases. Auditing procedures designed to influence the
manner of expenditures, rather than trace and record patterns of
cash flow, impinge upon the independence of the public corpo-
ration. The public corporation needs independent control over
expenditures to carry out its public service functions efficiently
and to retain its identity as a corporate enterprise. The model
public corporation ought to be exempted from these sections of
the Government Corporation Control Act\textsuperscript{190} which would largely
relieve it of responsibility for its own financial management.\textsuperscript{191}

\textsuperscript{186} It ought to be noted that the conclusions reached regarding the role of the ICC with
respect to the public corporation are not materially different than those reached by the
Department of Transportation's Report to the Congres. See DOT REPORT, supra note 88,
at 104–09.


\textsuperscript{188} See, e.g., Abel, supra note 152, at 197; Pritchett. The Government Corporation


\textsuperscript{190} One section of the Act itself appears to provide Congress with the necessary

\textsuperscript{191} TVA provides an example of a public corporation which has apparently benefited
from deliberate exemption from regulatory legislation. The impact of the Government
Corporation Control Act is extensively modified with respect to TVA. It is authorized to
Regarding the structure of corporate funding, various schemes have been devised to provide enterprise capital. The specifics of the schemes depend upon the kind of activity performed and the prospect of profitable operations. The goal of the model public corporation is to provide efficient service to the public, utilizing the revenue derived to cover operating costs. Services which produce losses would be subsidized and such subsidies should be separate items in the corporation's budget. Long-term funding would come from loans, principal and interest of which would be subject to federal guarantees, and from the issuance of debt securities, the interest and redemption of which would be federally secured. Amtrak's current funding, dependent as it is on annual appropriations, does not allow planning for a sensible program of capital expenditures or projecting of a schedule of expanded operations. The public corporation must have access to a pool of funds of known dimension and free of arbitrary curtailment, if it is to provide the quality and quantity of service that is necessary in light of established organizational goals.

Because a public corporation is a governmental entity, the corporation's relationship to the government becomes important in deciding which, if any, governmental immunities should be extended to it. The issue of immunity from taxation is important for both theoretical and practical reasons. The power of Congress to grant tax exemptions to public corporations has never been seriously challenged. However, the extent of a state's ability to tax federal public corporations is an issue which has engendered a good deal of discussion. In those cases where Congress has not specifically exempted public corporations from state taxation,

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192 See Lilenthal & Marquis, supra note 153, at 563–65, 586–95; Seidman, supra note 157, at 183–86.

193 The funding structure proposed is not unlike that of the TVA which has from its beginnings been funded by three primary sources: its own revenues, appropriations from Congress, and income from the issuance of its own bonds. See Abel, supra note 152, at 185; C. Pritchett, supra note 177, at 234–36.

194 The unsatisfactory nature of Amtrak's funding method has been critically examined. At least one proposal calls for the corporation to receive an open-ended appropriation, i.e., one that would not be limited to any specific period of time. See DOT REPORT, supra note 88, at 109.

195 See Thurston, supra note 161, at 109.

196 See, e.g., Abel, supra note 152, at 197–98; Lilenthal & Marquis, supra note 153, at 596–601; Thurston, supra note 161, at 475–85.
courts have allowed the states to tax real property held by the corporation, but prohibited the taxing of revenues obtained from the performance of governmental functions.\textsuperscript{197} However, where Congress has explicitly exempted public corporations from state taxation, its power to do so has not been questioned.\textsuperscript{198} Indeed congressional power to preempt such state taxation has been so widely recognized that most commentators assume Congress's power in this area would have automatic application.\textsuperscript{199} The model public corporation should be exempted from all income and property taxes. The corporation will be a genuine public service enterprise performing an important transportation function. To the extent that it relieves the states of the need to expend tax monies on construction and operation of facilities for public transportation, the corporation is making a contribution to their respective tax funds. Also, any imposition of a heavy tax burden on an organization designed to be nonprofit can only make organizational goals more difficult to achieve. In lieu of allowing the states to tax the corporation, Congress can, as it has done in similar situations,\textsuperscript{200} grant the states a percentage of the corporation's revenues earned within their respective jurisdictions. Although this approach is not without problems,\textsuperscript{201} it can remove some political opposition to the formation of a public passenger


\textsuperscript{199} The Doyle Report in discussing the advantages of a federal public corporation for rail passenger service notes: "One of the advantages of a Federal corporation will be its strong position in relation to State and local taxation," 1968 Hearings, supra note 3. at 129. In his discussion of Amtrak's enabling legislation, R.W. Harbeson commented: If NRPC had been established as a public corporation rail passenger service. property contributed to the Corporation would have been removed from state and local tax rolls. The necessity of reimbursing state and local governments for the loss of tax revenue would consequently have become an issue. Harbeson, supra note 156. at 337. n.9.

\textsuperscript{200} See 16 U.S.C. § 831 (f) (1970) which provides for a revenue reimbursement scheme for TVA and the states in which it operates.

\textsuperscript{201} See Lilenthal & Marquis, supra note 153. at 600: Again even though the activity is one which produces substantial revenues. the proper measure of payments to be made to the states may or may not be the amounts they would have received by way of taxes had the enterprises been privately conducted. Against tax losses should be balanced, to some extent at least. benefits which may result to the region through the federal enterprise. . . . Further, it will be necessary to determine in particular instances whether payments shall be made to state and local governments during the whole life of the federal enterprise or only for a period of sufficient duration to permit them to make necessary adjustments in their governmental and tax structures.
rail corporation while allowing the corporation to function without incurring a crippling financial liability.

The susceptibility of a government-owned public corporation to legal process and suit has not been a subject of controversy. Although Congress has the power to grant immunity from suit to a government corporation, this immunity does not automatically attach to the corporation by virtue of its governmental character. In fact, Congress has nearly always granted a waiver of immunity to its public corporations, allowing them to sue and be sued as a private business. The model public corporation should be no exception. The protection afforded by the Federal Tort Claims Act, which allows suit directly against the United States under certain circumstances, is too restrictive to safeguard the public interests affected by corporate operations. To allow the public corporation to defend its rights and accommodate those of the public, it must be given the authority to bring suit in its own name and made liable to suit as a corporate entity separate from the federal government.

B. The Regional Passenger Transportation Agencies

The tension between the common carriers' responsibility to provide public service and the unprofitable consequences has not abated. In his original designation of a system of routes for Amtrak trains, the Secretary of Transportation weighed heavily the prospective financial viability of every route. Given the congressional mandate of operating a "for-profit corporation," perhaps no other approach was possible. Neither the states nor any local or regional authorities or agencies had any formal role in route designation despite their obvious interest. The absence of an organized procedure or reliable method for determining local desires for rail passenger service, coupled with Amtrak's profit-making directive, makes it understandable that Amtrak's

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204 See Abel, supra note 152, at 198-99; Thurston, supra note 161, at 372-91.
206 The example of the TVA is again instructive. TVA is specifically exempted from the operation of the Federal Tort Claims Act, and has the authority both to sue and be sued in its own corporate name. See 28 U.S.C. § 2680(1) (1970) and 16 U.S.C. § 831(c) (1970).
209 See Harbeson, supra note 156, at 337.
management has continued a policy of reducing financially un-
remunerative services, despite public protest.

From Amtrak's inception the need for state as well as federal subsidies was apparent, if the shrinking of service was to be
controlled. The National Rail Passenger Service Act provides
that any "state, regional, or local agency" may request service in
addition to that operated by Amtrak. However, the Act also
requires a local governmental contribution of no less than
two-thirds of the service's costs less revenues. Some
commentators have noted that, in light of the short-term dis-
continuance notice requirements imposed by the Act, this cost
requirement is unfair, and in some cases, alternative rates of
contribution have been suggested. Present attempts to draw
complimentary local funds into Amtrak's operating budget have
proven largely unsuccessful. The model regional passenger
transportation agencies, RPTAs, will reduce the financial burden
for the local governments in two ways: first, the RPTA is required
to contribute only one-half the losses incurred in providing the
service; second, the tax base for generating the needed revenues
would be spread over the several states comprising the RPTA. A
consensus acknowledging the necessity of a given route service
must be reached by a large number of people over a relatively
wide area. If such a consensus can be achieved, it is fairly certain
that there will be both a real need for rail passenger service and a
means of funding it not unduly burdensome to either the users or
the federal treasury.

Interstate compacts can form the legal basis for regional pas-

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210 The Department of Transportation, presumably with the endorsement of Amtrak's management, has recommended the abandonment of several long and short haul routes. See DOT REP., supra note 88, at 79-98.

211 See NARP Proposals for Restructuring Amtrak Train Service Between Chicago and Florida and Between the West and the Midwest, 1973 Hearings, supra note 73, at 297-304. See also Thoms, supra note 33, at 108-31, indicating the railroad's historical difficulties in discontinuing passenger trains and in abandoning the business of transporting passengers because of public opposition which delayed discontinuance proceedings. Such opposition was presumably based on the public's perceived need for service private rail carriers could not afford to satisfy.


215 See Harbeson, supra note 156, at 337.

216 See, e.g., 1973 Hearings, supra note 73, at 287. NARP proposes the Act be amended to require a contribution of only one-third by the local governmental unit.

217 As of the end of 1972, Amtrak was operating three services partially funded by local governments: (1) Boston-Worcester-Springfield; (2) Chicago-Galesburg-Quincy; and (3) Philadelphia-Harrisburg. See 1972 NRPC ANN. REP., supra note 73, at 11-12.
senger transportation agencies. Compacts have been previously suggested to Congress for the organization of specific regional transportation authorities. but the model proposes a nation-wide system of compacts which would be closely coordinated with a public corporation. The compact itself is a constitutionally sanctioned device, increasingly employed by states with common problems. Although historically limited to narrow uses, it has achieved widespread application in a variety of situations. All compacts share some characteristics, but they can be divided into those which require congressional consent and those which do not. Inasmuch as congressional consent is required whenever the compact affects the balance of power within the federal system, such consent is required in nearly every

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220 One commentator reports that, "Between 1783 and 1920, the states entered into thirty-six compacts. Between 1921 and 1955, they entered into sixty-five. Since 1955, more than a score of additional compacts have been established...". W. Barton, INTERSTATE COMPACTS IN THE POLITICAL PROCESS 3 (1967). See V. Thurbys, INTERSTATE COMPACTS 1783-1966: A COMPILATION (1966).


222 At least ten different applications of the compact device have been made. They include interstate agreements involving boundaries and cessions of territory, crime control, interstate accounting, uniform legislation, conservation and use of natural resources, taxation, control and improvement of navigation, utility regulation, civil defense, and regional education. See V. Thurbys, supra note 220, at 97-135.

223 One commentator has noted six such characteristics:
1. It is formal and contractual. 2. It is an agreement between the states themselves, similar in content, form, and wording to an international treaty, and usually embodied in state law in an identifiable and separate document called the 'compact.' 3. It is enacted in substantially identical words by the legislature of each compacting state. 4. At least in certain cases, consent of Congress must be obtained; in all cases, Congress may forbid the compact by specific enactment. 5. It can be enforced by suit in the Supreme Court of the United States if necessary. 6. It takes precedence over an ordinary state statute.

F. Zimmerman & M. Wendell, supra note 221, at 42.


225 See V. Thurbys, supra note 220, at 75; F. Zimmerman & M. Wendell, supra note 221, at 34.
case. Since regional passenger transportation agencies would have a significant impact on interstate commerce, consent will be necessary. A blanket statutory grant of prior consent to all compacts for RPTAs would be the most practical approach. This procedure has been applied previously when Congress wanted to promote interstate cooperation. Although interstate compacts have been criticized for removing the electorate from governmental decision-making, they provide an ideal legal mechanism for binding states together to pool their resources to meet common local needs.

The model regional agencies themselves would be very similar to many previous public authorities. However, one significant difference arises from the definition of a public authority. While entities created by interstate compact have been referred to interchangeably as authorities, commissions, administrations, boards, and agencies, the public authority proper has been defined as "a limited legislative agency or instrumentality of corporate form intended to accomplish specific purposes involving long-range financing of certain public facilities without legally or directly impinging upon the credit of the State." Public authorities are generally considered self-supporting, revenue-producing bodies financed by bond issues. Given the proposed function of the model RPTA, it cannot be a self-supporting, revenue-producing entity. In this sense the RPTA is not a true

226 For a critical analysis of such requirement see Carman, Should the States Be Permitted to Make Compacts Without the Consent of Congress?, 23 CORNELL L.Q. 280 (1938).

227 Consent in advance to the formation of interstate compacts has been granted, for example, in the fields of forest protection, crime control, tobacco regulation, flood control, and park and parkways preservation. See F. Zimmerman & M. Wendell, supra note 221, at 57–58.

228 See M. Ridgeway, supra note 224, at 308–09.

229 The Supreme Court has ensured the legal validity of the compact device in several decisions which affirmed the Court's authority to enforce such agreements and to pass upon their meaning and legality. See West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951); Virginia v. West Virginia, 246 U.S. 565 (1918); Virginia v. Tennessee, 148 U.S. 503 (1893).

230 For a detailed and thorough discussion of the concept of the public authority and its practical implementation in the United States and abroad see the collection of articles in 26 LAW & CONTEMP. PROB. (1961).


235 See Gerrig, supra note 232, at 600.
public authority, but rather is a public agency with responsibility for making local policy decisions regarding regional requirements for intercity rail passenger service and apportioning the costs of the service among its member states. However, the flexibility of this governmental instrument does not preclude the possibility of gradually allowing the agency to assume greater responsibilities for transportation services. If these responsibilities grow to include intraregional mass transportation systems, a conversion to the public authority form of organization, with its reliance on bonded debt financing, might be justified economically. The regional passenger transportation agency can meet the current need for a system to provide necessary passenger rail service and to apportion the costs. The RPTA can also meet the future need for more coordinated and efficient satisfaction of growing local transportation demands.

VI. Conclusion

The industrial revolution made the railroads and passenger trains possible, and rapid national growth made them practical. At the present stage in the evolution of these social processes, the passenger train is in a paradoxical situation: while some elements of society demand its continuance, the same society cannot generate the private capital required to sustain it. This phenomenon is not endemic to any one nation; it characterizes a development in all nations where newer technology has displaced the passenger train as the principal means of long-distance intercity transportation. The nearly invariable response to the problem is subsidization in one form or another. The relevant concerns are to apply the subsidy so that those benefitting from the service bear the cost and to minimize the total cost burden.

Although the American and British requirements for rail passenger transportation are different, the British concept—originating demand for the service at the regional level and split-

\[236\] In the area of railroad services particularly, the agency can readily expand its scope of activities. Many freight lines which produce only marginal traffic are being abandoned by carriers, often to the detriment of the small shippers who rely on them while unable to generate enough traffic to sustain them. A regional agency could conceivably approach this problem in a similar way as it has done with the passenger problem, i.e., provide deficit subsidies where services are necessary to regional economic welfare. In the case of freight service subsidies, the payments would be made to the private carrier operating the line rather than to a public corporation. See Carter, Solutions for Abandonment Problems and for Marginal New Rail Line, 72 RAILWAY MANAGEMENT REV. NO. 3, at 1 (1972).
ting costs so that the government provides a reasonable subsidy for service that is necessary—is a sound one which can be applied to meet the American needs. The public corporation and the interstate compact are means for implementing this concept that are familiar to the American legal system.

—Vincent J. Tolve